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THE
AMERICAN LAW REGISTER.

OCTOBER, 1867.

THE CONSTITUTIONALITY OF THE CONCLUDING EXEMPTION CLAUSE IN THE BANKRUPT LAW.

THE fourteenth section of the national Bankrupt Law of 1867, after designating the manner in which the title to the bankrupt's property shall be transferred to and vested in his assignee, proceeds to except a number of specified articles from the operation of the assignment, and then makes a further and concluding exemption in favor of "such other property not included in the foregoing exceptions, as is exempted from levy and sale upon execution or other process or order of court, by the laws of the state in which the bankrupt had his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864."

This last exemption clause, it will be observed, is a new feature in our bankruptcy legislation. Neither the Act of 1800 nor that of 1841 contains anything similar to it, although the latter act was passed mainly in the interest of the debtor class. It is proposed in this article to inquire whether this provision in the law is or is not constitutional and valid.

The Constitution of the United States, Article I., Sec. VIII., declares that "The Congress shall have power To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

This grant of power stands upon much the same foundation with that of regulating commerce, given in the preceding clause of the same section. It is the interest of every state to show especial favor to the commercial enterprises of its own citizens, and it is a common policy to protect their trade from competition by discriminating regulations, and in case of loss to shield them, as far as honesty will permit, from being stripped of their remaining property by foreign creditors. The mischiefs, then, to be guarded against by this constitutional provision were that the several states might give different measures of justice to creditors from different jurisdictions, and that a dishonest debtor, also, by scattering his property about in several states, might keep a part out of the reach of the law: *Federalist, XLII.* Hence would result not only inequality of rights to creditors, but also, from multiplicity of legislation, a general ignorance of what those rights might be in each particular case where credit was given to a citizen of another state, while debtors, on the other hand, would find opened a wide door to fraud and evasion. Another reason for a national system, entitled to regard, was to be found in the preference given by our American courts to attaching domestic creditors over foreign assignees in insolvency.

As bankruptcy legislation, at the time when our Constitution was framed and for many years afterward, was considered wholly in the interest of the creditor class, it is probable that little weight was given to the other possible result of this grant of power, that of giving an honest debtor the opportunity of commencing life anew, free from the fetters of all previous obligations, wherever he might try his fortunes.

The remedy for these mischiefs—the legislation to meet these wants—the Constitution, then, put it in the power of Congress to supply; but this grant is coupled with a limitation: the laws established must be uniform throughout the United States. This condition is bound up with the power.

What is the meaning of *uniform* laws? In Worcester's Dictionary the definition given of the word uniform is: "Having always the same form, fashion, or manner; following the same plan, method, design, or tenor; consistent, consonant, undeviating, equable, alike;" and one of the illustrative quotations annexed is this from Bishop Taylor: "Sometimes there are

many parts of a law, and sometimes it is *uniform* and hath in it but one duty." In the history of English law the term is familiar. In 1548 was enacted the statute 2 Edward VI., a Bill for an Uniformity of Service and Administration of Sacraments to be had throughout the Realm. The preamble sets forth "That there had been several forms of service, and that of late there had been great difference in the administration of the sacraments But, that there might be an uniform way over all the kingdom, the king had appointed the Archbishop of Canterbury, with other learned and discreet bishops and divines, to draw up an order of divine worship, which they, by the aid of the Holy Ghost, had with one uniform agreement concluded on:" Parliam. Hist. Vol. 3, p. 234. An act of similar character was the famous "Act of Uniformity," 13 & 14 Car. II., which required every clergyman to assent to the same form of worship and doctrine, as established by law throughout the kingdom. In our own Constitution the term occurs but three times, and only in this first Article: twice in the clause immediately under consideration, and once in a preceding clause, "but all duties, imposts, and excises shall be uniform throughout the United States:" Hickey's Const. Analysis, p. 121. The original draft of the latter provision read, "all duties, imposts, and excises, prohibitions and restraints, laid or made by the legislature of the United States, shall be uniform and equal throughout the United States:" Elliot's Debates, Vol. 5, p. 479. The committee to which it was referred reported it back in these words: "All tonnage duties, imposts, and excises, laid by the legislature, shall be uniform throughout the United States," and it was subsequently still farther shortened and put in its present shape: Id. pp. 484, 543. The first draft was evidently regarded by the committee and the Convention as redundant: *laid* and *made* were regarded as equivalent terms, and *uniform* and *equal* lay under the same objection.

The fourth of the Articles of Confederation declared that the free inhabitants of each state, with certain exceptions, should be entitled to all privileges and immunities of free citizens in the several states, and the provision for an uniform rule of naturalization was intended to meet the difficulties resulting from this previous policy: Federalist, XLII.; 1 Curtis Comm. on the

Const., p. 199. The old law, that is, adopted the various conditions of citizenship in the several states of the confederacy, and made the citizen of one a citizen of all: the new law looked to the establishment by the nation of some independent and universal rule of admission to the privileges of its citizenship.

It would seem, then, whether we reason from etymology, from historical use, or contemporaneous construction, that UNIFORM LAWS can mean nothing less than laws of one and the same form, prescribing one invariable and universal rule.

One law or system of laws of supreme and universal authority, prescribing with certainty the rights of creditors in every state, and making those rights equal as against debtors in every state, and their property wherever situated, answers the ends proposed by this constitutional grant; and if it also makes the bankrupt's discharge of equal authority in every state, and permits proof of claims to be made and allowed in each state for use in any other, the advantages of uniformity are carried still farther. The rule of uniformity is—The same law for all.

Such has been the legislative construction regarding the other subjects upon which uniformity was required. One rule of naturalization has been prescribed. One rate for duties, imposts, and excises has been fixed. Suppose now that Congress should pass a law adopting for bankruptcy proceedings in the courts of the United States the provisions, *mutatis mutandis*, of the bankrupt or insolvent laws of the state in which such courts might be held, and declaring that a discharge obtained in this manner according to the laws of any state should be a valid discharge throughout the United States. This would be one law, and would prescribe one rule of proceeding, but it would not be one rule for all:—it would not be, in other words, the same rule for each case, nor, therefore, an uniform law. Its measure of justice would be uncertain, inconstant, and unequal.

What has Congress done in enacting the provision now in question? It has allowed the laws of each state to shield from creditors the property of its bankrupt citizens, to whatever amount its legislature has seen fit to determine. True, it does not allow these legislatures to frame new exemptions in view of this act, but this very provision adopting those exemptions, only, allowed in 1864, produces a still greater inequality of rights.

In twelve states, and among them are Pennsylvania and other great commercial states, the laws in force in 1864 allowed to debtors no greater exemptions than those provided for in any event by the universal exceptions enumerated in the national law: James, Bankrupt Law, p. 58. Had these states the power, they would not be unlikely, in view of this new act, to provide more liberal exemptions for their debtor citizens, and thus put them on a footing not less favorable than that enjoyed by debtors in other states, whose legislation has been less in favor of the creditor interest. Now, however, they are shut out from this power, and must see their own creditor citizens returning from Iowa, perhaps, with a petty dividend from the estate of a bankrupt there, who remains in the comfortable enjoyment of his country farm, with his library and pictures about him, a flock of fifty sheep in his pasture, a full barn-yard, with provender and fuel enough for six months' use, and three months' salary, if he had earned any, to put at interest, while the assignee of that same Iowa bankrupt may perhaps be wringing from some Pennsylvania debtor property identical in character with that which his assignor retains under the laws—thus adopted by Congress—of his own state. Nor can the citizens of any state, admitted into the Union since 1864, nor of any territory, derive advantage from this exemption.

This limitation, then, in reference to the state laws of 1864 increases instead of diminishing the inequality which seems, however, inherent in the measure. Every article exempted subtracts, of course, from the fund out of which the creditors are to be paid. Let us suppose that two men go into bankruptcy each owning a house worth \$3000 and other property amounting to \$1500, and each owing debts amounting to \$8000; one of these men living in St. Louis and one in Philadelphia. Each is allowed under the general provisions of the act, in furniture and other necessaries, \$500, and in wearing apparel, &c., \$400 more: the expenses of settling each estate, also, are \$200. Examine the result:

The Philadelphia bankrupt has assets worth . . .	\$4500
Deduct exemptions allowed as above . . .	\$500
	400
And expenses of settlement	200
Remaining for dividends	<u>\$3400</u>

The St. Louis bankrupt has assets worth	\$4500
Deduct exemptions allowed as above	\$500
400	
Deduct also amount allowed by Missouri law for his house ¹	3000
And expenses of settlement	200
	4100
Remaining for dividends	\$400

The liabilities being assumed to be \$8000, the creditors of the Pennsylvania bankrupt will receive $4\frac{1}{2}$ per cent. upon their claims, and the creditors of the Missouri bankrupt will receive but 5 per cent.!

It is to be observed, also, that these exemptions are regulated not by the law of the place "in which such debtor has resided or carried on business for the six months immediately preceding" the act of bankruptcy, but "by the laws of the state in which the bankrupt has his domicil at the time of the commencement of the proceedings in bankruptcy."

When Solon, in a time of great "depression" and distress, was empowered to devise and promulgate such laws as he might deem to be for the good of his country, he indiscreetly told some of his friends shortly before his laws were publicly announced, that he had determined to confirm all existing land titles, and to discharge all existing indebtedness. These friends, then, quietly went about buying land and borrowing the money with which to pay for it, so that, when the laws were promulgated, they were found with large land titles for the laws to confirm, and large indebtedness for the laws to discharge. In much the same way might an Eastern debtor seek a new home and homestead in the West, a week or two before bankruptcy became inevitable, and if it appeared to be a removal with a *bona fide* intention of making his future residence there, it might not be easy to determine how such purchases could be invalidated or attacked by creditors.

It may be argued, in opposition to these views, that throughout our bankruptcy legislation a priority of payment has been always accorded to debts due from the bankrupt to his state, and that the constitutionality of this affirmation of state laws has never been questioned, although its results often produce great inequality of

¹ James, Bankrupt Law, p. 62.

rights to individual creditors. To this it seems a sufficient reply, that this was a right of the several states, which they did not give up, by the ratification of the United States Constitution. It belongs to their right to exist, that they should be able to retain assets under their jurisdiction to pay the owner's indebtedness to themselves. The similar and paramount right of the United States is also an incident of its existence as a nation.

It is certainly then a matter of serious question whether Congress have not, in this particular provision of the act, transcended the constitutional limitation of their power. If so, the other and principal provisions of the law would, without doubt, remain unaffected and in full force : *Warren v. Charlestown*, 2 Gray 98.

Hardships there are undoubtedly on both sides. The debtor who has acquired certain property on the faith of its inviolability under existing laws has his subject for complaint if a new law, passed in the exercise of an unusual power, and passed largely in his interest, is construed to take it away. And if such a construction is put upon it by the courts, it will be reluctantly and only because they believe that *ita lex scripta est*.

S. E. B.

NEW HAVEN, Conn.

THE UNANIMITY OF JURIES.¹

DEAR SIR : Observing in the papers that you have proposed in the Convention to abolish the unanimity of jurors as a requisite for a verdict in civil cases, I beg leave to address to you a few remarks on a subject which has occupied my mind for many years, and which I consider of vital importance to our whole administration of justice. Long ago I gave (in my Civil Liberty and Self-Government) some of the reasons which induced me to disagree with those jurists and statesmen who consider unanimity a necessary, and even a sacred element of our honoured jury-trial. Further observation and study have not only confirmed me in my opinion, but have greatly strengthened my conviction that the

¹ A letter from Dr. Francis Lieber, to a member of the New York Constitutional Convention, revised with additions by the author.